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ALEXANDER L. STEVAS,

No. 82-1437

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HOMEWOOD CITY BOARD OF EDUCATION: DR. GEORGE C. FRENCH, individually; JAMES L. HOLLOWAY, DR. MAMIE L. FOSTER, RICHARD T. OWENS, ROBERT BLACKSHEAR, and ELBERT R. BOONE, individually; MICHAEL S. GROSS, CLYDE J. COOK, JR., N. P. ARDILLO, CLAYTON C. NUNN, and MARGARET KACHELHOFER, in their official capacities with the Homewood City Board of Education,

Petitioners,

v.

JEAN AVERY,

Respondent.

PETITIONER'S REPLY BRIEF TO BRIEF OF RESPONDENT

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Respondent's brief in opposition has totally ignored the essential issue raised by petitioner, and instead concentrates on extraneous matters taken out of context. Petitioner asserts that the paramount issue is whether the Court of Appeals disregarded the "clearly erroneous" standard of Rule 52 (a) Fed. R. Civ. P. in reversing the decision of the District Court as condemned in *Pullman-Standard v. Swint,* ..... U.S. ....., 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982).

In deciding this case this Court should not lose sight of the undisputable and operative facts:

> The Homewood Board of Education maintained a valid maternity leave policy which was flagrantly violated by respondent, and respondent was terminated for that violation.

Before the District Court, respondent's attorney admitted both the validity of the notification policy, and the fact that respondent had violated that policy. The District Court accordingly found as a fact that the Board had justifiably terminated Avery for her willful violation of that policy. On appeal the respondent ignored their admissions and the specific facts found by the District Court. What is now the Eleventh Circuit Court of Appeals likewise ignored those admissions and findings of fact and substituted therefor its interpretation of the evidence by concluding that the respondent would not have been terminated absent her out-of-wedlock pregnancy. In opposing the petition for writ of certiorari, respondent has again ignored the specific findings of fact by the District Court and has requested this Court to ignore (i) those findings of fact, (ii) the "clearly erroneous" standard of Rule 52 (a) Fed. R. Civ. P. and (iii) this Court's decision in *Pullman-Standard v. Swint, supra.*

If, and only if this Court ignores the existence of a valid maternity leave policy and that such policy was clearly violated, can this Court accept respondent's argument that the Eleventh Circuit Court of Appeals did not commit the very practice of independent appellate fact finding which was condemned in *Pullman-Standard v. Swint.* Where a clear and valid policy is violated, the question of whether a termination based on that violation was pretextual raises a question of fact to be decided by the trial court on remand.

Respondent has stated that the alleged immorality of respondent's was the motivating factor in the Board's decision to discharge her, and in support of that contention, has cited a statement made by the Board's attorney at trial (R.B. 2).[1] Respondent's use of this statement is highly misleading. The statement is taken out of context. The Board's attorney, as the record clearly shows, made this statement as part of legal argument between the attorneys in direct response to a statement of respondent's attorney. As legal argument made after presentation of all the evidence, this statement showcased by respondent was legal argument, not evidence. The evidence presented by petitioner demonstrated respondent's flagrant violation of a valid school policy.

In finding *no evidence* permitting the inference that the Board of Education would have discharged respondent absent her out-of-wedlock pregnancy, the Court of Appeals overlooked the following uncontroverted testimony:

> (1) That there existed a pregnancy notification policy requiring four months notification prior to the date of delivery of the baby to enable the Board to find a replacement teacher when a pregnant teacher requested a leave of absence;
>
> (2) That the attorney for the respondent stipulated, and the District Court found, that the notification policy was reasonable;
>
> (3) That respondent did not notify the Board of her pregnancy until the eighth month of pregnancy;
>
> (4) That the superintendent of education testified that respondent admitted that she had known of her pregnancy for four months prior to notifying the Board, and that she had not intended to tell the Board of her pregnancy, planning instead to have the baby and then come back to work (Tr. 47);

[1]Reference to R.B. are to respondent's brief.

(5) That upon notification of the pregnancy, both the principal of the school and the superintendent of education notified respondent at the outset that she had violated the notification rule (Tr. 27, Tr. 46);

(6) That both the previous superintendent and the current superintendent testified that the rules and regulations of the Board were applied equally to all teachers in a nondiscriminatory manner (Tr. 215, 213);

(7) That the Board wrote respondent notifying her that a hearing would be held to determine whether to cancel her employment contract on grounds of insubordination, neglect of duty in that she had failed to notify the superintendent of her pregnancy in time, and immorality;

(8) That, after a full due process hearing, the Board voted to cancel respondent's contract;

(9) That the decision of the Board was affirmed by the Alabama State Tenure Commission;

(10) That the District Court abstained from deciding the question of immorality, and found, as a fact, that the school board had justifiably terminated respondent for her willful refusal to comply with the school notification policy.

Thus the District Court correctly applied the test enunciated in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977) by determining that without regard to the respondent's out-of-wedlock pregnancy, the Board would have reached the same decision as to respondent's employment in light of her insubordination or neglect of duty. In so doing, the District Court avoided the pitfall pointed out in *Mt. Healthy*, that constitutionally protected conduct should not insulate an employee when other valid grounds exist for the employer's action. Respondent should not benefit from her out-of-wedlock pregnancy when she had otherwise violated a legitimate school rule.

Petitioner submits that the Court of Appeals usurped the fact-finding function of the District Court as condemned in *Swint*. Furthermore, even if the incorrect legal standard had been applied by the District Court the Court of Appeals should have remanded the case to the District Court for further proceedings.

CONCLUSION

For reasons stated above and in the petitioner's original brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ DONALD B. SWEENEY, JR.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Petitioner's Reply Brief to Brief of Respondent upon all attorneys of record, namely: The Honorable Michael H. Gottesman, The Honorable James M. Harris, The Honorable Jeremiah A. Collins, 1000 Connecticut Avenue, N.W., Washington, D. C. 20036, The Honorable David Rubin, 1201 Sixteenth Street, N.W., Washington, D. C. 20036, The Honorable W. Troy Massey, P. O. Drawer 5058, Montgomery, Alabama 36101, via United States mail, postage prepaid and correctly addressed, this the 13 day of May, 1983.

Donald B. Sweeney, Jr.